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Supreme Court of the United States

OCTOBER TERM, 1947.

No. 763

MRS. FRANK JOWERS, ET AL.,

versus

DOWELL, INCORPORATED.

BRIEF OF RESPONDENT IN OPPOSITION TO APPLICATION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

VAL IRION,
Counsel for Respondent.

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MAY IT PLEASE THE COURT:

For the sake of brevity, we will refer to petitioner's reasons for the issuance of a writ of certiorari in the order presented by her, on pp. 6 and 7 of her application, and shall not repeat them here.

Reasons one and two relate to the same subject and will be treated together. This objection is highly techni-

cal. Petitioner, herself, has proceeded in violation of the Federal Rules of Civil Procedure.

Petitioner at no time objected to the form of the motion for a directed verdict in the District Court, but argued and briefed the questions raised. Her failure to object was a waiver. Federal Rules of Civil Procedure 12 and 46, and particularly Rule 15 (b). As a matter of fact, her objection was an afterthought, first raised in a **supplemental** brief in the Circuit Court of Appeals.

However, the Circuit Court considered the question as to whether or not defendant had filed a proper motion for a directed verdict and concluded from the record, as it was in its power to do, that a proper motion had been filed. Petitioner here does not question this power so used by the Circuit Court as being in abuse of its discretion.

Petitioner is, of course, in error in urging that the decision of the Circuit Court of Appeals for the Fifth Circuit in this case is contrary to decisions of the Circuit Court of Appeals for the Fourth and Third Circuits in *Virginia Carolina Tie & Wood Co. v. Dunbar,* 106 F. 2d 383 (1939) and *Ryan Distributing Co. v. Caley,* 147 F. 2d 138 (1945), respectively.

Since a mere reading of the three cases will demonstrate that the decision of the Court of Appeals in this case is in accord with the decisions cited by petitioner, we shall not lengthen this brief by quotations therefrom nor discussions thereof.

The third and fourth grounds of petitioner's application merely seek to have this Court review the facts to determine whether sufficient evidence had been adduced to permit the case to go to the jury, and to substitute its findings thereon for those of the Court of Appeals. The Court of Appeals reviewed the evidence solely to determine if petitioner had made out a sufficient case to be submitted to the jury. The Court of Appeals found that she had not, and the sole purpose of reasons three and four of the petition is to have this Court again review these facts. Since petitioner has been accorded a new trial, there is no merit in these requests.

Reasons five and six have been answered by the Supreme Court of the United States in its decision in *New York Central Railroad Company v. Johnson*, 279 U. S. 310, 318; 73 L. Ed. 706, 710; 49 S. Ct. 300 (1929).

The effect of the decision of the Court of Appeals in this case is to grant a new trial. It is not, and could not be argued that respondents failed to file, within the time prescribed, a motion to set aside the verdict of the jury and **a motion for a new trial,** with the reasons and grounds therefor set forth in full. The Court of Appeals merely remanded the case for a new trial.

This being true, it is submitted that the decision of the Court of Appeals is interlocutory, and while certiorari may be granted to review an interlocutory order, ordinarily this is not done. Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, page 623; *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*,

240 U. S. 251, 258; 60 L. Ed. 629, 633; 36 S. Ct. 269 (1916); *Hanover Star Milling Co. v. Metcalf*, 240 U. S. 403, 408, 409; 60 L. Ed. 713, 716; 36 S. Ct. 357 (1916), and *American Construction Company v. Jacksonville, etc. Railway Company*, 148 U. S. 372, 383, 384, 37 L. Ed. 486; 13 S. Ct. 758 (1893). These decisions are directly applicable to the present situation where the case goes back for an entirely new trial.

It is respectfully submitted that the decision of the Court of Appeals is an interlocutory decree; is in harmony with the jurisprudence of the Supreme Court and the other Courts of Appeals; no question of public importance is presented and the decision complained of is in full accord with applicable local law.

It is therefore submitted that the petition for writ of certiorari in this case should be denied.

Respectfully submitted,

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Attorney for Respondent.

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This is to certify that copies of this Brief have been served on opposing counsel on this the .... day of May, 1948.

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